

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of Section 251 Unbundling)	
Obligations of Incumbent Local)	CC Docket No. 01-338
Exchange Carriers)	

**COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NOTICE: Record evidence from the PA PUC is being filed separately by CD-ROM and is available for inspection at the FCC.

On August 20, 2004, the Federal Communications Commission (Commission) released an Order and Notice of Proposed Rulemaking by which the Commission established a pleading cycle for comments on how to respond to the D.C. Circuit's *USTA II*¹ decision in establishing sustainable new unbundling rules under 47 U.S.C. §§ 251(c) and 251(d)(2). The Commission also seeks comments on whether the details of the independent unbundling obligations pursuant to 47 U.S.C. § 271 need to be clarified or modified in light of *USTA II*. Proposed rules were published in the Federal Register on September 13, 2004.

¹ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *pets. for cert. filed*.

Interested parties are invited to file Comments on or before October 4, 2004, and Reply Comments on or before October 19, 2004.

The Pennsylvania Public Utility Commission (PA PUC) hereby files timely Comments. The views expressed in this comment are not intended to reflect the decisions that the PA PUC may make in future related proceedings.

Sustainable New Unbundling Rules

The Commission requests comment on how to establish sustainable new unbundling rules under 47 U.S.C. §§ 251(c) and 251(d)(2). NOPR at para. 9.

It is axiomatic that sustainable new unbundling rules must comply with Congressional intent. The statute preserves state access regulations and commands that the Commission “shall not” preclude the enforcement of any regulation, order or policy of a state commission that establishes access and interconnection obligations of local exchange carriers, is consistent with the duties imposed on carriers by section 251, and does not substantially prevent implementation of the requirements of section 251 and the development of competitive markets. 47 U.S.C. § 251(d)(3). Both the Commission and state commissions have the role of an “effective steward” of competition. *See Verizon Commun. Inc. v. Law Off. of Curtis V. Trinko, LLP*, ____ U.S. ____, 124 S.Ct. 872, 882 (2004).

The PA PUC urges the Commission to adopt a federal unbundling regime that preserves state access regulations consistent with Congressional intent. The

preservation of state authority facilitates the development of a nuanced approach to the imposition of access obligations in local markets for the development of competition in the public interest.

States like Pennsylvania have large rural populations served by independent local exchange carriers. There are a number of countervailing policies that come into consideration when determining the access obligations of these rural telephone companies. See, *e.g.*, 47 U.S.C. § 251(f). In our judgment, the national policy should favor the ability of state commissions to consider the various local circumstances in determining their unbundling obligations. Special circumstances may also exist in the larger incumbent service territories; therefore, the same ability to consider local circumstances for those companies was also wisely preserved by Congress and should not be impeded by any new federal unbundling regime established by the Commission.

We further commend to the Commission's attention that Congress provided that the "necessary" and "impair" access standard of 47 U.S.C. § 251(d)(2) applies exclusively to unbundled access under section 251(c)(3). The standard is not imposed upon state commissions in the exercise of their authority under section 251(d)(3). Therefore, the Commission need only (and should only) develop a necessary and impair standard for its use in making determinations under section 251(c)(3).

The Commission should make clear that states have authority, under section 251(d)(3), to establish unbundled obligations to address local

circumstances so long as such obligations do not substantially prevent implementation of the requirements of section 251 and the development of competitive markets.

Section 271

The Commission seeks comment on whether section 271 obligations need to be clarified or modified. NOPR at para. 11 n.38.

The PA PUC submits that the Commission should clarify section 271 obligations as well as the details associated with documenting and maintaining those obligations. Recent PA PUC decisions have revealed the need for such clarity. See Reconsideration Order entered May 28, 2004 at PA PUC Docket No. I-00030100 and Order entered July 8, 2004 at PA PUC Docket No. R-038871C0001.² The PA PUC has held that existing section 271 access requirements and the TELRIC rates at which they have been priced will continue on an interim basis pending further action by the Commission. This policy insures that the PA PUC does not sanction any Regional Bell Operating Company (RBOC) proposal filed in Pennsylvania that arguably violates or compromises applicable section 271 obligations to keep local markets open to competition.

The PA PUC's Reconsideration Order of May 28 provides:

² These orders are available at the PA PUC website. Go to <http://www.puc.state.pa.us/PcDocs/467014.doc> and <http://www.puc.state.pa.us/PcDocs/478365.doc>, respectively.

Verizon Pennsylvania Inc. has filed a federal complaint for declaratory and injunctive relief against the May 28 Reconsideration Order. *Verizon Pa. Inc. v. Fitzpatrick*, No. 04-2709 (amended complaint filed Aug. 10, 2004, E.D. of Pa).

We grant the petition in part to clarify our position on the pricing of network elements unbundled pursuant to § 271. Contrary to Verizon’s suggested interpretation, the *December Order* does not mandate that TELRIC pricing be used to price such network elements. Rather, as observed by ARC, the order merely provides that existing Tariff No. 216 rates be used at present because they are currently in effect and fall within the range of a just and reasonable price. Verizon remains free to exercise all of its rights to propose the establishment of new just and reasonable prices applicable to § 271 network elements.

Since the *Triennial Review Order* did not fully flesh out all the processes, procedures and requirements associated with Verizon’s § 271 access obligations, we recognize that it remains unclear as to where and how Verizon’s “just and reasonable” rate for access in a particular state (since § 271 is granted on a state-by-state basis) is established and/or disclosed to the requesting carrier. Our review of the *TRO*, the D.C. Circuit’s opinion, and even the FCC’s brief in the *USTA* litigation, has not provided any clarity on this point. However, given that the Tariff No. 216 is filed with the Commission, the Commission’s existing procedures for tariff changes, namely 66 Pa. C.S. §§ 1301 and 1308, are available to be used if Verizon seeks to establish new non-TELRIC rates for enterprise switching. Meanwhile, the uncertainty again supports our observation that the Tariff No. 216 rates are currently in effect and should be used until a new rate is properly established.

. . .

Presently, no FCC decision has relieved Verizon from its ongoing § 271 obligations in Pennsylvania, or fully defined what those obligations are in the wake of the *Triennial Review Order*. We conclude that there is no firm basis for this Commission to unilaterally sanction removal of a § 271 element from Verizon’s offerings in Pennsylvania under the present state of FCC orders. If Verizon believes that its § 271 obligations in

Pennsylvania have changed, it should put that issue to the FCC. Upon FCC approval of Verizon's position, modifications of relevant offerings would then be appropriate.

Reconsideration Order at 11-13 (footnote omitted).³

Similarly, the PA PUC's Order of July 8 provides:

Based on the conclusion that line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations, we conclude that there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders. We further note that on October 24, 2003, the Verizon telephone companies filed a petition asking the FCC to forebear from § 271 obligations. See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); CC Docket No. 01-338. The matter is pending. Therefore, we conclude that it would be improvident to adjudicate Verizon PA's request to remove line sharing from its PA 216 Tariff until the ambiguity surrounding its obligation to maintain line sharing based on Section 271 has been addressed by the FCC.

If Verizon PA believes that line sharing should no longer be a part of its Section 271 obligations, that issue should be put to the FCC either in conjunction with or separate from, its forbearance request. Our determination to answer the second material question on Section 271 TA96 authority, makes it unnecessary to address state authority or preemption issues at this time. We express no opinion regarding the enforceability of our independent state authority

³ The PA PUC notes that the PA PUC has an existing tariff filing system that, if needed, can be used to allow Verizon pricing flexibility. See, *e.g.*, Verizon Pennsylvania Inc. Informational Tariff for Competitive Services, Pa. P.U.C. No. 500, Section 2, 1st Revised Sheet 13 at ¶ 29 (providing pricing flexibility on certain retail offerings).

preserved by 47 U.S.C. § 251(d)(3) and any other applicable law. After Verizon obtains a determination from the FCC as to its ongoing obligation to maintain line sharing as part of its 271 commitments, Verizon may then petition the Commission for such further action as may be appropriate.

July 8 Order at 20.

In Pennsylvania, Verizon has subjected itself to state commission oversight under the so-called “Performance Assurance Plan.” See *In the Matter of Application of Verizon Pennsylvania Inc., et al.*, Memorandum Opinion and Order, FCC 01-269 (rel. Sep. 19, 2001), CC Docket No. 01-138; *accord* 47 U.S.C. § 271(c) (linking state commission review and approval of interconnection agreements with the conditions for RBOC entry into the long distance market). The PA PUC may monitor Verizon’s post-entry performance under the plan and may impose penalties and measurements to ensure post-entry compliance with section 271 requirements. *Trinko, supra*.

The PA PUC encourages the Commission to further address the processes, procedures and requirements associated with a BOC’s section 271 obligations. We suggest an approach by which section 271 obligations are tariffed, thus, making state commission’s the “custodians” of the obligations. The section 271 obligations would be those that each RBOC agreed to offer in exchange for the right to offer other intra LATA service in that state. Upon petition, the Commission should then make the determinations as to when the obligations can be relieved and provide the applicable BOC with the necessary express

authorization to enable state commissions to allow the filed tariffs to be modified, consistent with the Commission's determination.

Therefore, in lieu of unilateral action by the RBOCs, such a system will enable all stakeholders to be clear on what the obligations are at any particular time and will provide an orderly process by which those obligations can be altered, upon express approval by the Commission.

Records from State "9-Month" Proceedings

The Commission encourages state commissions to file state records of summaries of the proceedings initiated in response to the *Triennial Review Order*, particularly the "9-Month" proceedings. NOPR at para. 15.

Pertinent parts of the record, developed in Pennsylvania at our Docket No. I-00030099, including a summary of record evidence prepared by the presiding administrative law judge and comments thereto are being submitted on CD-ROM by overnight mail to the Commission. This information is provided to the Commission upon request to aid the Commission's efforts. The PA PUC expresses no opinion on the merits of the materials submitted since the PA PUC never had the opportunity to take official action regarding this proceeding.

Batch Hot Cut Process

The Commission encourages state commissions to summarize state efforts to develop batch hot cut processes. NOPR at para. 15.

Currently, a batch hot cut process for Pennsylvania is under consideration in our proceeding captioned “Development of an Efficient Loop Migration Process” at PA PUC Docket No. M-00031754. Two prehearing conferences have been held (July 15 and September 15, 2004), with a third scheduled for October 28, 2004. After recently denying Verizon's petition to discontinue the proceeding, the presiding administrative law judge directed the parties to develop, by consensus, a list of issues to be addressed (*i.e.*, the scope of the proceeding) and a procedural schedule by October 15, 2004.

The parties of record in the proceeding are Verizon Pennsylvania Inc.; Verizon North Inc.; AT&T Communications of Pennsylvania, LLC; Cavalier Telephone Mid-Atlantic LLC; Covad Communications Company; MCI WorldCom Network Services, Inc.; the Pennsylvania Office of Consumer Advocate; and the Pennsylvania Office of Small Business Advocate.

On July 7, 2004, Verizon Pennsylvania Inc. and Verizon North Inc. (collectively Verizon) jointly filed and served a petition to discontinue, or in the alternative, to stay the proceeding. In this petition, Verizon explained that this investigation had been initiated by the PA PUC Procedural Order entered October 3, 2003 pursuant to the Commission’s *Triennial Review Order*, 18 FCC Rcd 16978 (rel. August 21, 2003); Errata, 18 FCC Rcd 19020 (rel. September 17, 2003). Subsequently, the United States Court of Appeals for the District of Columbia Circuit vacated certain portions of the order, *United States Telecom Ass’n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*). Verizon asserted in its

petition that “. . . clearly, the original task the [Pennsylvania] Commission set out to accomplish in this proceeding – determining whether Verizon’s batch hot cut process complies with now-vacated FCC requirements – is no longer relevant nor required of the [PA PUC]” and therefore the PA PUC should discontinue the batch cut proceeding. In the alternative, Verizon requested that the proceeding be stayed pending the outcome of the New York Public Service Commission (PSC) batch hot cut investigation at *Proceeding on Motion of this Commission to Examine the Process, and Related Costs, of Performing Loop Migrations on a More Streamlined (i.e., Bulk) Basis*, Case 02-C-1425.

At the July 15 prehearing conference, there was general agreement among the parties other than Verizon that the proceeding should not be discontinued but that a schedule should be adopted that accommodates the New York proceeding. The presiding judge agreed.

The presiding judge noted that the PA PUC’s March 25, 2004 Secretarial letter discussing the effects of the *USTA II* decision provides:

There will be no suspension of proceedings at M-00031754. We have a particular interest in solutions to facilitate local competition that could be developed in this proceeding and their relationship to the fulfillment of commitments made by Verizon Pennsylvania Inc. in 2001. Further, we note that we have pre-existing independent state law basis and authority to continue this proceeding. We modify only the May 13 deadline for a recommendation. The parties are free to propose, and the Office of Administrative Law Judge to accept a reasonable schedule for issuance of a recommended decision.

Verizon's alternative request, that the proceeding be stayed pending completion of the New York PSC investigation, was also denied. The presiding judge held that this proceeding should not be stayed indefinitely or litigated immediately, but should proceed with an opportunity for the parties (and the PA PUC) to consider what – if anything – the New York Public Service Commission does. This was done to assist in the development of a uniform batch hot cut process through Verizon's multi-state operating area, a result that will provide benefits both to the industry and to Verizon. Verizon was directed to file and serve, on or before the 15th day of each month, updates on the New York investigation or any other matter relevant to this proceeding.

On September 15, the parties agreed and were directed to confer among themselves as to the appropriate scope of this proceeding, to develop a uniform listing of issues to be used in testimony and briefs, and to agree on a procedural schedule. Based on the procedural schedule the presiding judge directed to be developed, a further prehearing conference is scheduled for October 28, 2004.

RESPECTFULLY SUBMITTED,

\s Maryanne Reynolds Martin

Maryanne Reynolds Martin
Attorney ID No. 74648

P.O. Box 3265
Harrisburg, PA 17105-3265
Tel: (717) 787-5000
Fax: (717)783-3458

Dated: October 4, 2004

Frank B. Wilmarth
Deputy Chief Counsel

Bohdan R. Pankiw
Chief Counsel
Counsel for Pennsylvania Public
Utility Commission